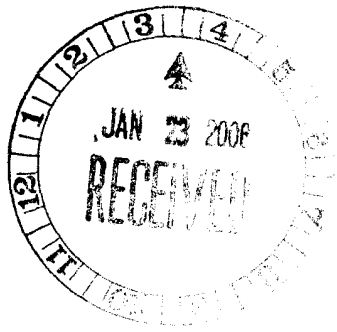

January 23, 2006

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423

RE: STB Docket No. 34795, *Roquette America, Inc. – Petition for Exemption from 49 U.S.C. § 10901 to Construct a New Line of Rail in Keokuk, Iowa*

Dear Secretary Williams:

Please find enclosed the original and ten (10) copies of the REPLY OF ROQUETTE AMERICA RAILWAY, INC. TO KJRY REPLY TO PETITION FOR EXEMPTION to be filed in the above referenced proceeding. Also enclosed is a diskette with a copy of the filing in Word and PDF format.

Please note that the orginal and the copies contain COLOR IMAGES in Exhibit 1.

An extra copy of this filing is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Jeffrey O. Moreno

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34795

ROQUETTE AMERICA, INC.—
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901
TO CONSTRUCT A NEW LINE OF RAIL IN KEOKUK, IOWA

REPLY OF ROQUETTE AMERICA RAILWAY, INC. TO
KJRY REPLY TO PETITION FOR EXEMPTION

Pursuant to the Board's January 12, 2006 order in this proceeding, Roquette America Railway, Inc. ("RARI") hereby replies to the "Reply to Petition for Exemption" filed by the Keokuk Junction Railway Co. ("KJRY") on December 19, 2005. Although the Board's rules generally prohibit a reply to a reply, the Board directed RARI to submit this reply in response to KJRY's allegations that the Board lacks jurisdiction over the rail construction project that RARI has requested authorization to construct in its November 29, 2005 Petition for Exemption. KJRY has presented the following three reasons why it believes the Board should dismiss RARI's Petition:

1. RARI proposes only to construct industrial track under 49 U.S.C. § 10906, not a regulated common carrier line of railroad that may be constructed under 49 U.S.C. § 10901.

2. RARI does not propose to construct an extension of rail service to new territory that will provide the shipper with access to a carrier not already serving the Keokuk facility of RARI's parent company, Roquette America, Inc. ("RAI").

3. RARI's proposal is really a request for terminal trackage rights over KJRY under 49 U.S.C. § 11102.

Each of these arguments suffers from clear errors of law and fact, and thus are without merit. The Board should not dismiss RARI's petition, but should proceed to determine that the Petition

satisfies the standards for granting an exemption for the construction of RARI's proposed line of rail.

I. RARI's Proposed Construction Is Not Spur Or Industrial Track Under Section 10906.

KJRY claims that the Board lacks jurisdiction over RARI's proposed construction under Section 10901 because RARI's proposal actually involves the construction of spur or industrial track under Section 10906. This argument can be quickly dispelled by controlling precedent that KJRY either has ignored or overlooked.

KJRY erroneously contends that a line of decisions by the Board and the courts that determine whether a particular segment of track is a "spur, industrial, team, switching or side" track within Section 10906, as opposed to track governed by Section 10901, requires dismissal of RARI's Petition. While RARI does not take issue with these decisions or KJRY's description of their holdings, KJRY has ignored other decisions that establish a clear exception to the decisions cited by KJRY.

This exception is thoroughly explained by the Board's decision in STB Docket No. 41986, *Effingham R.R. Co.—Petition for Declaratory Order—Construction at Effingham, IL*, (served Sept. 12, 1997). There, the STB held that, even when the character of the track may be switching, if the larger purpose and effect of the proposal is to construct what will constitute the petitioner's entire line of railroad to serve a new shipper, the proposed operation and construction of that line is subject to Board authority under Section 10901. *Id.*, slip op. at 3.

Even though KJRY's principal argument purports to apply the "purpose and effect" standard, it has not done so consistent with *Effingham*. In *Effingham*, the STB cited *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983), the decision upon which KJRY principally relies, for the very same proposition as KJRY cites it. *Id.* at 2. But, the STB then noted that *Texas & Pac. Ry.*

v. Gulf, Etc. Ry., 270 U.S. 266 (1926), establishes an exception to the principles described in *Nicholson*:

> Where, however, the proposed trackage extends into territory not already served by the carrier, and particularly where it extends into territory already served by another carrier, the Supreme Court has found its purpose and effect to be of national concern, and subject to the jurisdiction of the Interstate Commerce Commission (now the Board).

Effingham, slip op. at 2. Indeed, the Supreme Court explicitly held that "[i]f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18 [of the Transportation Act of 1920], although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." *Texas and Pacific*, 270 U.S. at 278 [emphasis added].

The Board also observed that *Brotherhood of Locomotive Engineers v. U.S.*, 101 F. 3d 718, 728 (D.C. Cir. 1996), another D.C. Circuit case decided after *Nicholson*, holds that the Board "may not allow the focus on use to obscure the larger purpose and effect of the transaction," so that, if switching operations that otherwise might categorize track within the scope of Section 10906 have the effect of substantially extending a carrier's lines into new territory, the Board "may not decline jurisdiction." *Effingham*, slip op. at 3. KJRY has neglected both the *Texas and Pacific* and *BLE* decisions, along with the *Effingham* decision itself, and as a result reaches an erroneous conclusion. Thus, the Board must reject KJRY's contentions that RARI's proposed construction is Section 10906 track merely because the track is short and the character of service contemplated resembles service provided over spur or industrial track.

The Board's "purpose and effect" analysis in *Effingham* led it to conclude that, even though the petitioner intended only to provide switching service over track that it proposed to

both construct and acquire within an industrial park, those transactions in fact were within the Board's jurisdiction because the newly constructed and acquired track would constitute the petitioner's entire line of railroad to serve a new shipper. RARI proposes a similar transaction to serve RAI's Keokuk facility over approximately 2000 feet of track that it will both construct and acquire for that purpose. *See* Petition at 6. Because this project will constitute RARI's entire line of railroad for the purpose of extending its line into new territory already served by KJRY, RARI's project also must be within the Board's jurisdiction under Section 10901.

II. RARI Proposes to Construct an Additional or Extended Rail Line Within the Scope of Section 10901.

In its second argument, KJRY contends that Roquette does not propose to construct an additional or extended rail line within the scope of Section 10901. Although KJRY correctly states the test of whether new rail construction or operation requires approval under Section 10901, at page 13 of its Reply, KJRY fails to apply that test properly. A correct application of that test leaves absolutely no doubt that RARI's proposed construction is an additional or extended rail line.

KJRY properly cites *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266 (1926), for the proposition that new rail construction is subject to "approval under (or exemption from) Section 10901" if the new rail line is an "extended or additional" line. KJRY Reply at 13. KJRY also correctly states that "the ICC, STB, and the courts have long held that proposed construction must extend the reach of the railroad so as to allow that railroad to provide service to new territory or new shippers that it did not previously serve." *Id.* [emphasis added]

But, then KJRY inexplicably proceeds to apply this standard, not to RARI the railroad, but to RAI the shipper.[1]

The holding in *Texas & Pacific* is clear that the STB must make its determination on whether a proposed construction is an extension of service by looking to the carrier involved, and whether the construction will extend the territory of the carrier. RARI is an entirely new carrier that currently provides service to no customer or territory. As RARI currently has no "territory," simply building and operating the proposed line will extend its territory. Thus, the conclusion that this action is subject to STB jurisdiction is inescapable. Just as in *Texas & Pacific*, this conclusion is further supported by the fact that RARI will be expanding into territory already served by another carrier, in this case, KJRY.

KJRY attempts to mislead the STB by applying the *Texas & Pacific* analysis of extended territory to the shipper, rather than the carrier. Specifically, KJRY states that Section 10901 would only apply if the proposed build out "would provide Roquette [RAI] with access to a railroad that currently does not serve it." KJRY Reply at 13. KJRY then contends that it provides a neutral switching service to RAI that provides RAI with access to BNSF Railway Company ("BNSF"), and thus RAI will not gain access to a new carrier by virtue of the proposed construction. This analysis focuses on the wrong entity.

The question is not whether the shipper RAI would have access to a new railroad, but is instead whether the railroad RARI would have access to a new shipper (in this case, RAI). As RARI currently has no shippers, this extension would expand its territory by adding a new shipper – RAI. Moreover, the law does not focus on whether the carrier currently serving the

[1] KJRY apparently has confused even itself by declining to differentiate between Roquette and RAI in its Reply. Instead, KJRY has elected to refer to them both collectively as "Roquette." KJRY Reply, note 1. Nevertheless, the context in which KJRY refers to "Roquette" in Part I.B. of its Reply leaves no doubt that it is referring to RAI, the shipper.

shipper is "neutral"—it focuses on whether the carrier proposing to build is extending its line of railroad into new territory.

Even if the Board were to ask the question as posed by KJRY, it still must conclude that RARI's proposed construction is within the scope of Section 10901, because RAI will in fact receive service from a new carrier, RARI. KJRY's focus on BNSF simply is wrong, since BNSF is not the carrier proposing to extend its line. KJRY has lost sight of the fact that RARI, not BNSF, is the new carrier that proposes to extend its rail line in order to serve RAI.

Furthermore, RARI does not agree with KJRY's characterization of itself as a neutral switching carrier. KJRY Reply at 14. The situation described by KJRY at RAI's Keokuk facility exists only by a contractual arrangement that was negotiated when RAI was capable of receiving direct competitive service from both KJRY and BNSF. As detailed on pages 4-5 of RARI's Petition, RAI no longer has direct competitive service due in significant part to the actions of KJRY itself. Through the proposed build-out, RARI would restore that competitive balance by becoming a second carrier at RAI's Keokuk facility, so that RAI no longer must rely exclusively upon KJRY to serve the Keokuk facility.

III. RARI's Proposal Is Not a Request For Trackage Rights Under Section 11102.

KJRY improperly attempts to convert RARI's need to cross KJRY's line with its new construction into a request for trackage rights under Section 11102. This argument is nothing more than an absurd attempt by KJRY to avoid the crossing requirement of Section 10901(d).

What KJRY cavalierly refers to as "trackage rights" is the short distance (approximately 170 feet) that RARI must travel over KJRY track as part of a double-turnout crossing. There is nothing improper, or even unprecedented, about a double-turnout crossing. The Board noted this very fact in another recent decision involving a crossing of KJRY in Keokuk, Iowa:

> KJRY argues that BNSF does not have section 10901(d) crossing rights because BNSF's operation over KJRY's track is not a crossing. KJRY claims that section 10901(d) can only apply to a crossing that is accomplished by means of the traditional "diamond" or "frog" configuration originally utilized here. But the fact that the typical crossing uses a diamond configuration does not mean that there is only one form that a crossing can take.[38] Nor is there any requirement that a crossing can only involve a certain amount of track. In fact, there are all sorts of configurations in the rail network that serve as crossings.[39] Thus, the term "crossing" must be viewed pragmatically, as we (and KJRY for several years after the crossing was relocated) did here.
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> ---
>
> [38] For example, in Public Service Company of Colorado—Petition for Crossing Authority Under 49 U.S.C. 10901(d), STB Finance Docket No. 33862 (Sub-No. 1 (STB served Mar. 22, 2001), we noted that the crossing carrier would cross BNSF's track by means of a double turnout configuration, rather than a diamond, so as to minimize interference with perpendicular traffic.
> Similarly, in STB Finance Docket No. 34178 (Sub-No. 1), Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation, Union Pacific Railroad Company discussed a situation at Owatonna, MN, where a diamond crossing was replaced by a two-turnout configuration.
>
> [39] A configuration other than a diamond crossing can be beneficial to the railroads involved because of the generally higher cost of maintaining that type of crossing.

The Burlington Northern and Santa Fe Ry. Co.—Pet. for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, 2003 STB LEXIS 244, *32 (served May 13, 2003) [emphasis added] ("*BNSF Crossing*"). In that decision, the Board authorized BNSF to cross nearly one-quarter mile of KJRY track via two turnouts, a far greater distance than the 170 feet proposed by RARI. *Id.* at *3.

In many ways, the facts of this case are very similar to the facts in *BNSF Crossing.* Both cases involve crossings of KJRY track in the vicinity of Keokuk, Iowa for the purpose of restoring the rail service status quo that existed prior to construction of a floodwall in 1995 that

required both KJRY and BNSF to relocate their rail lines in the area. *Compare* RARI Petition at 4-5 *with BNSF Crossing* at *2-3. In *BNSF Crossing*, BNSF sought to restore access to its Mooar Line, and in this proceeding, RARI seeks to restore RAI's direct access to two rail carriers.

Indeed, Exhibit 1 shows that, prior to construction of the floodwall, BNSF operated over a double turnout crossing of KJRY in almost the same exact area that RARI has proposed to cross KJRY. Exhibit 1 is a map that was Exhibit A to the "1977 Agreement" that is attached as Exhibit 3 to RARI's Petition for Exemption. The BNSF crossing is located on the far left side of the map just above the phrase "To St. Louis." The map indicates that the BNSF crossing was 188 feet long, which is comparable to RARI's proposed crossing of approximately 170 feet. Both crossings have the same configuration and are located in virtually the same location. RARI's crossing would restore this prior crossing in a manner that is more true to the original crossing than was the BNSF's Mooar Line crossing in the *BNSF Crossing* decision, since the Mooar Line crossing was restored in a different location and in a different configuration from the original crossing.

The Board should view RARI's crossing of KJRY in the same "pragmatic" manner that it viewed BNSF's crossing of KJRY in *BNSF Crossing*. The area in which RARI must cross KJRY is on a narrow strip of land situated between the Mississippi River and a high bluff that is occupied by the RAI facility, KJRY's mainline, BNSF's mainline, BNSF's yard, the floodwall, and various road crossings. *See* RARI Petition, Exhibit 1. When constructing its track in this area, RARI must consider the location of these facilities, the location of other track turnouts, operating efficiencies, and various engineering considerations.

For example, it is undesirable for a locomotive or railcar to turn in two different directions at once. Therefore, at a minimum, a double turnout crossing must be as long as the

longest piece of equipment that will operate over the crossing, so that the equipment is able to clear the first turnout before turning into the second turnout. The location of the turnouts also must not interfere with the adjacent rail operations of KJRY and BNSF, including the locations of other turnouts on their track. The 170 foot length of RARI's double-turnout crossing has taken into consideration all of these factors in order to develop a crossing that will cause the least amount of interference with KJRY's operations. To the extent that KJRY contends otherwise, those issues will be addressed when RARI files its Crossing Petition pursuant to 49 U.S.C. § 10901(d).

KJRY's Reply says nothing as to why it alleges that RARI's crossing should be treated as a request for trackage rights under Section 11102, except for the fact that the double-turnout crossing requires RARI to cross over a short segment of KJRY's track. As demonstrated above, that alone is not sufficient to bring the crossing within Section 11102. Furthermore, under the circumstances, it would be absurd to treat RARI's 170-foot double turnout crossing differently from the similarly situated quarter-mile double turnout crossing approved by the Board in *BNSF Crossing.*

IV. KJRY Has Not Justified Its Request For Additional Discovery and Pleadings.

If the Board does not dismiss RARI's Petition, KJRY has asked the Board to establish a procedural schedule allowing for discovery and three rounds of additional filings. On January 4, 2006, RARI asked the Board to adopt a procedural schedule that attempts to address KJRY's request for discovery and to provide KJRY with an opportunity to supplement its Reply with information obtained through the discovery process.[2] Indeed the discovery process already is underway insomuch as RARI and RAI responded to KJRY discovery requests on January 3,

[2] Although RARI sought KJRY's agreement to this procedural schedule, KJRY stated that it would not agree to *any* procedural schedule with RARI. This refusal even to discuss a procedural schedule is compelling evidence of KJRY's overall strategy of delay in this proceeding.

2006, and KJRY filed a motion to compel additional discovery on January 13, 2006. KJRY has opposed that procedural schedule and insisted upon the need for multiple rounds of discovery, including depositions, followed by three more rounds of evidence. KJRY bases its argument upon two issues. First, KJRY disputes RAI's ownership of certain property required for the proposed construction. Second, KJRY has alleged that the third party contractor engaged to assist the Board with the NEPA process has an impermissible conflict of interest. RARI submits that neither of these issues requires additional discovery or pleadings.

A. KJRY's property ownership claims are beyond the Board's jurisdiction and expertise.

The ownership of the property required for the proposed construction is not even a matter within the Board's jurisdiction to decide. Furthermore, Board precedent dictates that, when there is a dispute over the ownership of rail assets, the Board still may grant the requested authority, subject to a subsequent determination of ownership rights in the proper forum. Thus, this is not a subject that requires further discovery or pleadings before the Board.

In *MVC Transportation, LLC—Acquisition Exemption—P&LE Properties, Inc.*, STB Finance Docket No. 34462, 2004 STB LEXIS 666, *11-12 (served Oct. 20, 2004), the Board observed:

> It is a longstanding principle that the Board's grant of a notice of exemption to acquire gives the applicant permission to acquire, but does not mandate such. Thus, the authority the Board granted to MVC was permissive, not mandatory, and MVC's acquisition exemption could not confer on MVC any ownership rights to the Yard track assets it did not possess under Pennsylvania law. The Board's authorization cannot be viewed as conveying property rights to MVC or as a declaration by the Board that MVC actually owns particular assets within the Yard.

See also, Central Kansas Ry., LLC—Abandonment Exemption—In Marion and McPherson Counties, KS, STB Docket No. AB-406(Sub-No. 6X), 2001 STB LEXIS 472, *5 (served May 8,

2001) ("[T]he interpretation of deeds and the determination of who owns good title to property are issues of state law that are outside of the expertise of the Board."). Similarly, the Board's authorization to construct a new rail line also is permissive, not mandatory, and thus will not determine the property ownership rights of either RARI or KJRY.

In STB Finance Docket No. 34267, *Morristown & Erie Ry., Inc.—Operation Exemption—Somerset Terminal R.R. Corp.*, (served Nov. 27, 2002), the Board denied a request by a third party, STRR, to stay a Notice of Exemption on the grounds that ownership of the rail property to be conveyed was in dispute:

> The exemption permits M&E and STRC to consummate the described transaction if and when they, in fact, have the legal capacity to do so. The exemption, therefore, will have no immediate or demonstrated adverse effect on [STRR].

Similarly, if there truly is a genuine dispute over ownership of any of the tracks encompassed by RARI's proposal, the Board's authorization would allow construction to begin only if and when RARI has the legal capacity to do so. If KJRY's ownership claims are based on any substantive facts, KJRY should pursue an appropriate action in Iowa state court, rather than attempt to delay this proceeding.

As a matter of public policy, the Board should not allow entities, such as KJRY, to delay rail construction cases simply by disputing ownership of the property needed for the proposed construction. Otherwise, any entity could raise hollow claims of ownership for the purpose of bringing the Board's process to a grinding halt until the proper forum has issued a ruling. Nor should the Board place itself in the position of evaluating the parties' ownership evidence, since this would entangle the Board in evidence on a subject that is beyond its expertise.

Moreover, the issue of property ownership in this proceeding would be a particularly undesirable entanglement for the STB in light of the tenuous nature of KJRY's halfhearted assertion of ownership:

> Given the change in ownership of KJRY, the passage of a quarter of a century, and the lack of adequate records related to the Rock Island bankruptcy, it is premature to make any definitive statements regarding ownership of the Hub Track.

KJRY Reply at 18-20. KJRY's claims are particularly suspect because it has presented almost no evidence to support its ownership claims and it has not even pursued its ownership claims in a forum with jurisdiction to decide them.

RARI is concerned that KJRY is using hollow ownership claims to delay this proceeding. KJRY has presented no evidence of ownership over the Hub Track other than an inconclusive sketch and an allegation that it believes RARI once paid rent for the Hub Track.[3] In addition, KJRY has presented absolutely no evidence at all to support its ownership claims over any of the other track at issue. By failing to submit any significant ownership evidence in its Reply, which was the appropriate time under the Board's rules to present whatever evidence it possessed, KJRY has been able to keep this issue alive for purposes of delaying this proceeding through a purported need for additional rounds of discovery and evidence. But, KJRY should not need discovery of RARI or RAI to determine whether it, KJRY, has any ownership claim over the property. Moreover, this is not the forum for such discovery. The Board should not sanction this continuing manipulation of its procedures to the detriment of RARI.

[3] RAI has determined that this map does not even accurately reflect the track that existed in the Keokuk facility on the date listed on the map.

B. KJRY's conflict of interest claims are without any legal foundation and already have been rejected by SEA.

KJRY's claim that the Board's third party contractor for the environmental review process has an impermissible conflict of interest also does not compel additional discovery or pleadings. KJRY already has raised its conflict of interest claims in two extensive letters submitted to the Board's Section of Environmental Analysis ("SEA") on December 9, 2005 and again on January 9, 2006. In a December 21, 2005 reply to KJRY's December 9th letter, SEA firmly rejected KJRY's conflict of interest claims.

Apparently dissatisfied with this response, KJRY submitted the January 9th letter to SEA, in which it attempted to resurrect its conflict claim on the basis of documents that RARI and RAI voluntarily produced on January 3, 2006. Although RARI and RAI had objected to KJRY's discovery requests on this subject, they agreed to produce documents that related to KJRY's conflict allegations, in order to assuage KJRY's alleged concerns. Instead, KJRY has attempted to twist those documents to support its claims.

RARI replied to KJRY in a January 12, 2006 letter to SEA, in which RARI exposed KJRY's manipulation of the production documents and KJRY's erroneous interpretation of the law on conflicts of interest. Most notably, RARI quoted a Tenth Circuit decision, which observed that:

> After discovering that many agencies had "been interpreting the conflicts provision in an overly burdensome manner," the CEQ instructed that, absent an agreement to perform construction on the proposed project or actual ownership of the construction site, it is "doubtful that an inherent conflict of interest will exist" unless "the contract for EIS preparation...contains...incentive clauses or guarantees of any future work on the project." Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263 34,266 (Council on Envtl. Quality 1983).

Associations Working for Aurora's Residential Environment v. Colorado Dept. of Transportation, 153 F. 3d 1122, 1127 (10th Cir. 1998) [emphasis added]. From this observation, it is clear that no conflict of interest is likely to exist unless there is a promise of future work. KJRY's conflict allegations, by contrast, are based entirely on work that RAI awarded to the contractor prior to the current engagement for the environmental review and that the contractor completed nearly three months before RARI filed its Petition for Exemption. Thus, KJRY has not presented even a colorable conflict of interest claim that conceivably might justify further discovery and evidence.

The absurdity of KJRY's conflict objections, and hence the conclusion that KJRY is simply engaging in obstructionist delay tactics, is best evidenced by the fact that RARI seeks to construct its proposed rail project over a short distance on property that is now, and has been for nearly 100 years, a highly industrialized area. RARI Petition at 2. Furthermore, the rail line will be constructed immediately adjacent to the KJRY mainline, the BNSF mainline, and the BNSF yard. Thus, it is preposterous even to suggest that RARI would have anything to gain by selecting a potentially biased third party contractor.

The SEA has not responded to KJRY's January 9th letter as of this date and it is unclear whether it intends to do so. RARI submits that KJRY has had ample opportunity to support its claims based on RARI's discovery responses and SEA's disposition of the matter in its December 21st letter. As such, there is no basis for permitting additional discovery and pleadings on this subject.

KJRY has presented nothing beyond these two subjects to justify its request for additional discovery and pleadings in this case. Thus, the Board should deny KJRY's requested procedural schedule.

V. KJRY's First Supplemental Reply and January 19th Letter Further Propagate the Legal and Factual Errors in Its Reply.

On January 17, 2006, KJRY filed its "First Supplemental Reply" in which it alleged that RARI had improperly begun construction on the project proposed in RARI's Petition. RARI has attached the Verified Statement of Eric Tibbetts as Exhibit 2, which unequivocally declares that no construction has occurred on RARI's proposed project. KJRY subsequently retracted this allegation, in a January 19, 2006 letter to the Board, after RARI counsel pointed out that none of the construction described in the First Supplemental Reply even was in the area covered by the proposed project. Nevertheless, KJRY's January 19th letter asserts that this construction further illustrates why the Board should dismiss RARI's Petition. KJRY's arguments suffer from the same legal and factual errors as its other Reply arguments.

KJRY's first argument is premised on the allegation that RARI merely proposes to construct Section 10906 track. The construction witnessed by KJRY is an eastward extension of Section 10906 industrial track by RAI, not RARI. KJRY seems to believe that RAI's eastward extension of this track must mean that RARI's plan to terminate its proposed construction at the west end of this same track also renders RARI's construction Section 10906 track.[4] KJRY describes this as an "untenable position." KJRY 1/19/06 Letter at 2. But, as RARI has demonstrated in Part I, *supra*, KJRY has ignored STB and judicial precedent that in fact renders KJRY's position untenable.

This precedent holds that even if, as KJRY contends, RARI and RAI both use their respective tracks for services commonly rendered by means of Section 10906 track, RARI's purpose to extend its line into new territory renders such track an extended or additional line within the Board's Section 10901 jurisdiction. *Texas and Pacific* at 278; *Chicago Rail Link,*

[4] This is an extension of the argument that KJRY makes on page 12 of its Reply.

LLC—Lease and Operation Exemption—Union Pac. R.R. Co., STB Finance Docket No. 33323, slip op. at 5 (Sept. 2, 1997).

Second, KJRY contends the construction currently being done by RAI is one of the alternatives being considered by SEA as part of its environmental analysis. KJRY is not clear, however, as to how this allegation, even assuming *arguendo* that it is true, would preclude RAI from constructing this track, since RAI has decided to construct it as private track. Indeed, KJRY stops short of actually making this argument.[5] Thus, it is unclear how this allegation supports KJRY's request to dismiss RARI's Petition.

Third, KJRY contends that the existence of an eastern route that can be constructed without STB authority shows that "the alleged benefits of the proposed Section 10901 project appear to be achievable without Section 10901 authority [and] [a]s a result, the public convenience and necessity simply does not require the grant of Roquette's petition for exemption." KJRY 1/19/06 Letter at 2. Setting aside the factual issues surrounding this statement, KJRY misstates the proper legal standard for granting a petition for exemption to construct an additional or extended rail line.

The Board shall authorize new rail construction unless it determines that the proposed construction is "inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c) [emphasis added]. Prior to passage of the ICC Termination Act ("ICCTA"), the statute permitted the ICC to authorize new rail construction if the project was consistent with the public convenience and necessity. *See* 49 U.S.C. §10901(a) and (c)(1) (1995). In ICCTA, Congress intentionally eased the statutory standard by requiring the STB to authorize new rail construction unless it was inconsistent with the public convenience and necessity. *The Burlington Northern*

[5] KJRY quotes a July 6, 2005 letter from RAI to SEA, in which RAI observes that eastward construction towards BNSF's Mooar Line " may not require any STB action." But, KJRY conveniently omits that sentence from its quotation.

and Santa Fe Railway Co.—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, STB Finance Docket No. 33740, slip op. at 7, n. 20 (Served May 13, 2003).

Congress went even further by providing that the STB shall exempt a transaction from regulation under the statute, if it finds that (1) continued application of the statute is not necessary to carry out the rail transportation policy codified at 49 U.S.C. § 10101, and (2) either the transaction is of limited scope, or regulation under the statute is not needed to protect shippers from abuse of market power. 49 U.S.C. § 10502(a).

RARI's Petition satisfies the above standards. Those standards expressly do not require that the project be consistent with the public convenience and necessity, as KJRY seems to believe, and they do not give the STB discretion to deny RARI's construction Petition if RARI satisfies these standards. KJRY does not explain how, or otherwise allege that, the existence of a less desirable alternative route (a) renders RARI's proposal inconsistent with the public convenience and necessity; (b) makes continued application of the statute necessary to carry out the rail transportation policies; (c) broadens the scope of RARI's proposed transaction; or (d) requires regulation to protect shippers from abuse of market power. Since KJRY has not addressed the requisite legal standards, it has not provided any basis for denying RARI's Petition simply because there may be another way for RARI to connect RAI with BNSF.

WHEREFORE, RARI, respectfully requests that the Board (1) deny KJRY's request to dismiss RARI's Petition, and (2) proceed with a determination of RARI's Petition on the merits.

Respectfully submitted,

Nicholas J. DiMichael
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THOMPSON HINE LLP
1920 N Street, NW
Washington, DC 20036
(202) 331-8800

January 23, 2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of January, 2006, a copy of the foregoing Reply of Roquette America Railway, Inc. to KJRY Reply to Petition for Exemption was served by hand delivery upon counsel for Keokuk Junction Railway Co

Jeffrey O. Moreno